No. 17-742

In the Supreme Court of the United States

MARY ANNE SAUSE, PETITIONER

v.

TIMOTHY J. BAUER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the State of Texas. Amicus has a strong interest in the proper application of the qualified-immunity doctrine and is well positioned to comment on the application of that doctrine. The State of Texas is intimately familiar with the crucial role that qualified immunity plays in protecting law enforcement officers from "harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It is imperative that "insubstantial claims against government officials be resolved prior to discovery." *Id.*

At the same time, amicus recognizes that on the other side of the doctrine's delicate "balance" lies the very weighty "interest[] in vindication of [its] citizens' constitutional rights." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Qualified immunity, of course, does not shield officers from violating citizens' clearly established rights—that is, when the right in question is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotations and brackets omitted).

The pleadings in this case allege substantial interference with petitioner's constitutional right to pray in her own home—for no legitimate investigatory

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[1] Pursuant to Supreme Court Rule 37.2, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus contributed monetarily to its preparation or submission. Amicus provided timely notice of its intent to file this brief, and the parties consented to this filing.

purpose. *See, e.g.*, Pet. App. 19a (Tymkovich, J., concurring) ("If true, Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home."); *accord* Pet. App. 3a-4a, 17a. Such an action strikes at the heart of the Free Exercise Clause and is a clear constitutional violation.

SUMMARY OF ARGUMENT

The Tenth Circuit erred in affirming the dismissal of petitioner's complaint with prejudice.

Qualified immunity serves an important function in protecting officers from suits alleging conduct that does not violate clearly established rights. Concomitantly, in the rare instances where those clearly established rights are infringed, qualified immunity must necessarily give way. In still rarer circumstances, the alleged conduct is so obviously a clear violation of constitutional rights that there need not be a closely analogous judicial precedent saying as much. On the facts as pleaded by petitioner, this is one of those rare cases.

The application of the correct qualified immunity standard is particularly important in this case, given the right alleged to have been infringed. Petitioner, confronted with officers in her home and a situation that had "quickly devolved," Pet. App. 18a (Tymkovich, J., concurring), began to pray. The officers then stopped her from praying. Pet. App. 4a. By taking solace in prayer, she was invoking a time-honored tradition and religious practice deserving of the highest respect.

Construing the alleged facts in the light most favorable to petitioner, there was no legitimate law

enforcement purpose at stake when the officers ordered petitioner to stop praying. Under these facts as pleaded, it was thus clearly established that the law enforcement officers could not interrupt her private prayer: It was clearly established that her right to pray was protected by the Free Exercise Clause, that an officer's order to stop praying burdens that right, and that an officer needs at least a legitimate governmental reason to justify burdening that right. Existing precedent from the prison context—an environment that affords far less protection of individual rights than one's own home—was sufficient to place this constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This gave the officers fair warning that they could not impede an individual's religious practice without a legitimate reason for doing so.

ARGUMENT

I. In Rare Circumstances, A Right Is So Clearly Violated That Qualified Immunity Should Be Denied Even Without A Judicial Precedent Previously Addressing Comparable, Egregious Facts.

Amicus unequivocally supports the doctrine of qualified immunity. That doctrine serves the vital purpose of "[e]nsuring that those who serve the government do so with the decisiveness and the judgment required by the public good." *Filarsky v. Delia*, 566 U.S. 377, 390 (2012). It protects public officials "not simply from liability, but also from standing trial." *Johnson v. Jones*, 515 U.S. 304, 312 (1995). The doctrine recognizes that allowing frivolous claims, or those not

grounded in clearly established law, to proceed would do harm "not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Given the doctrine's "importan[ce]," *id.* at 808, it is both commendable and unsurprising that this Court "often corrects lower courts when they wrongly subject individual officers" to the threat of liability. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

But there are limits to qualified immunity. It represents "the best attainable accommodation of competing values," *Harlow*, 457 U.S. at 814—the "need to vindicate individual rights, on the one hand, and the equally vital need, on the other, that . . . officials exercising discretion will be unafraid to take vigorous action to protect the public interest," *Butz v. Economou*, 438 U.S. 478, 524 (1978). When the alleged unlawfulness is apparent "in the light of pre-existing law"—that is, when the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right"—officers cannot expect to have their unlawful actions shielded by qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

To be sure, preexisting law must speak "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997). This often means that the plaintiff must identify a case or cases in which "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). But in rare circumstances where officials' conduct strikes at the heart of a clearly protected constitutional right,

"officials can still be on notice that their conduct violates established law" even when the particular factual allegations are somewhat "novel." *Id.* at 741. This is one such rare circumstance.

Taking the allegations in Ms. Sause's complaint as true, no reasonable officer could have believed that he had the right to stop her from exercising her constitutional right to pray (particularly in the comfort of her own home) without any legitimate investigatory purpose. *Contra* Pet. App. 8a (holding that the officers could reasonably have believed that they were allowed "to order the individual to stop engaging in religiously-motivated conduct so that they can . . . briefly harass her before . . . issuing a citation [unrelated to the prayer and to their initial investigation]"). Although no case appears to have dealt with these precise facts, the contours of petitioner's legal right were clearly spelled out to put the officers on notice. It is true that no other court has had occasion to address the novel facts pleaded here—where an officer orders an individual in her own home to stop praying merely to harass her long after any legitimate purpose of the investigation had concluded. But that does not render this any less an "obvious case" of improper police action that strikes at the heart of a clearly established constitutional right. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *accord Hope*, 536 U.S. at 738; *Lanier*, 520 U.S. at 271.

II. It Is Clearly Established That An Officer Must, At A Minimum, Have Some Valid Law Enforcement Purpose Before Ordering A Person To Stop Praying.

At issue here is the fundamental right of an individual to pray in her own home, unrestricted by government officials whose legitimate investigation had already run its course under the facts as pleaded.[2] It is clearly established that an officer must have at least some valid justification before interfering with an individual's free exercise of religion. Under the facts pleaded by petitioner, any reasonable basis the officers might have had to stop Ms. Sause from exercising her constitutional right to pray had ceased by the time they directed her to stop praying. *See, e.g.*, Pet. App. 9a (observing that the officers' actions "immediately after issuing [the command to stop praying did] nothing to further their investigation"); Pet. App. 17a (Tymkovich, J., concurring) (explaining that "an initially justified police encounter" was "prolonged beyond the time reasonably required to complete the legitimate police objective justifying the encounter" and that "the officers' actions [were] not reasonably related in scope to that legitimate objective").[3]

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[2] As pleaded, the facts of this case may very well also establish a Fourth Amendment violation. *See* Pet. App. 17a-19a (Tymkovich, J., concurring). But that fact does not negate the separate First Amendment violation, and petitioner as the plaintiff was entitled to raise or omit whatever claims she wished.

[3] In contrast, if an individual were to use her right to pray actively to interfere with a legitimate ongoing investigation by

Nevertheless, the court of appeals granted qualified immunity on the basis that Ms. Sause's factual allegations were neither "obviously egregious," Pet. App. 9a, nor reflected in a closely analogous case, Pet. App. 8a. The court erred in doing so.

To defeat qualified immunity, this Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. This is one of those rare cases where, even if the issue has not presented itself in highly similar factual circumstances, well-established precedent has still placed the constitutional question beyond debate.

At the time this case arose, it was clearly established that the right to pray was protected by the Free Exercise Clause, and any reasonable officer would have known that ordering someone to stop praying without any investigatory justification (*see* Complaint at 8, *Sauce v. Bauer*, 2016 WL 3387469 (D. Kan. 2016) (15-cv-9633), ECF No. 1; *see also* Pet. App. 4a, 18a) was a clear constitutional violation.

A. A reasonable officer would have understood that the constitutional right to pray is clearly established.

It is clearly established that the right to pray is protected by the Free Exercise Clause. *See, e.g.*, *Wallace*

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ignoring questions or orders reasonably related to that investigation, the result would be different. *See infra* Part II.B (discussing the standard for justifying the burden). Those are not the facts alleged here. *See* Pet. App. 3a-4a, 17a, 19a.

v. Jaffree, 472 U.S. 38, 59 (1985) (referring to a student's ability to pray personally as a "right"); *accord, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (recognizing that one's ability to pray in accord with religious dictates implicates constitutional rights and requiring, in the prison context, that any burden on that right was reasonably related to legitimate penological interests).

The court of appeals correctly assumed that the Free Exercise Clause clearly establishes the right to pray. *See* Pet. App. 6a-7a. And there are few freedoms so enshrined as the right to practice one's religion as one sees fit. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("[The Constitution] specifically and firmly fixed the right to free exercise of religious beliefs."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("[The] freedom to worship one's Maker according to the dictates of one's conscience [is] a right which the Constitution specifically shelters."). Given the importance of religious freedom, this Court has recognized that "[t]he values underlying [the First Amendment] provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Yoder*, 406 U.S. at 214. And of all the acts that could be considered religious exercise, it is hard to conceive of a more quintessentially religious act than an individual praying.

Prayer is inextricably linked to the very founding of this Nation. When interpreting the scope of the Religion Clauses, this Court has observed that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as [Jefferson's 1785 Virginia Bill for Religious Liberty]." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 13 (1947). That Virginia law defined religion as "the duty which we owe to our Creator, and the manner of discharging it." Va. Const. art. I, § 16. In the debates surrounding the passage of the Virginia Bill for Religious Liberty, James Madison emphasized that even those opposed to the civil establishment of religion, like him, were nevertheless "earnestly praying" that lawmakers "may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in II *The Writings of James Madison* 191 (Gaillard Hunt ed., The Knickerbocker Press 1901); *see Everson*, 330 U.S. at 71-72 (including as an appendix Madison's *Memorial and Remonstrance*).

In fact, at a crucial moment during the Constitutional Convention of 1787, when tensions were high and differences seemed intractable, Ben Franklin implored his fellow delegates to look to God to provide them the strength to see through their important task: "I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every

morning before we proceed to business." I Max Farrand, *The Records of the Federal Convention of 1787* 452 (New Haven: Yale Univ. Press 1911) (James Madison's Notes on the Convention for June 28, 1787). The Convention heeded Franklin's call; from then on, its daily activities opened with a moment of prayer. *Id.* This tradition continues in large part to this day. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014).

Presidents, too, have long turned to prayer to guide the country. In the Nation's very first inaugural address, President Washington asked all to give "fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect." George Washington, *First Inaugural Address in the City of New York* (Apr. 30, 1789), in 101st Congress, *Inaugural Addresses of the Presidents of the United States*, S. Doc. 101-10, at 2 (1989). Inaugurations have included public prayer ever since. *See* Lt. Steven R. Obert, *Public Prayer in the Navy*, 53 Naval L. Rev. 321, 341 n.137 (2006).

In sum, this is "a Nation whose people turn to prayer in times of our most heartfelt sorrow and our moments of greatest joy." Proclamation No. 7672, 68 Fed. Reg. 23,829 (Apr. 30, 2003). A reasonable officer therefore would have known that the right to pray in one's own home in this Nation was clearly established.

B. A reasonable officer would have understood that stopping an individual from praying, without a legitimate purpose for doing so, impermissibly burdens a constitutional right.

It is likewise clearly established that the government may not infringe on rights protected by the Free Exercise Clause absent a legitimate, non-arbitrary interest. Many of the cases discussing the need for a legitimate governmental interest to prevent the free exercise of religion have arisen in the prison context. *See* Pet. 25-27. It is, thankfully, still "novel" (*Hope*, 536 U.S. at 741) to have officers intrude into people's homes and infringe on their free exercise rights, as was alleged here. But if a prisoner would have had a right to pray because there was no countervailing legitimate governmental interest to prevent the prayer, then a non-incarcerated individual not subject to arrest (and in her own home at that) clearly has such a right as well.

Incarceration, after all, necessarily entails "conditions [that] are restrictive and even harsh . . . [as] part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because of the need to maintain order, "prison officials must be accorded latitude in the administration of prison affairs" and "prisoners necessarily are subject to appropriate rules and regulations." *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam); *see Bell v. Wolfish*, 441 U.S. 520, 557 (1979) ("[G]iven the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.").

But even in the prison environment with necessarily curtailed rights, this Court has held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid [only] if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). As a result, such a prison "regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Furthermore, the underlying "governmental objective must be a legitimate and neutral one." *Id.* at 90.

The well-established existence of this "reasonably related to [a] legitimate ... interest[]" (*id.* at 89) standard should have given the officers here reasonable notice at least of this baseline for unacceptable conduct in an individual's home. It is hard to imagine an environment accorded greater protection—far more than a prison cell—than the privacy of a person's home. The sanctity of one's home has deep roots in the common law. It is the "prototypical" area of "protective privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). There is little more important than "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961); *accord Carey v. Brown*, 447 U.S. 455, 471 (1980) ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.").

Accordingly, if the government must have a legitimate penological interest to infringe the free

exercise rights of a convicted criminal in prison, then law enforcement interacting with a presumptively innocent individual in her own home obviously needed, at a minimum, a legitimate law enforcement interest to infringe her free exercise rights. That much should have been clear to the officers, regardless of whether the Tenth Circuit or any other court had confronted these precise pleaded facts before.

Once cases from the prison context are appropriately taken into consideration, there is a weight of circuit authority clearly establishing that an order to stop praying without a legitimate governmental justification unconstitutionally burdens the free exercise of religion.

The Tenth Circuit itself has had occasion to address the required justification for burdening prayer in the prison setting. In *Ghailani v. Sessions*, the plaintiff alleged that prison policies hindered his ability to pray Jumu'ah, a Muslim prayer practice. 859 F.3d 1295, 1304 (10th Cir. 2017). The court observed that "a prisoner alleging a violation of his First Amendment rights must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests." *Id.* (internal quotations omitted). Ultimately, the court upheld the dismissal of the prisoner's First Amendment claims, but only because he failed to plead the lack of a legitimate penological interest. *See id.*

Decisions from other courts of appeals—even if they do not control the qualified-immunity inquiry because

this case arose from the Tenth Circuit[4]—further support just how obvious it is that the government must have a legitimate justification to impede an individual's prayer. In *Mack v. Warden Loretto FCI*, for instance, the Third Circuit held that qualified immunity was unwarranted because it first needed to be determined whether there was a reasonable penological interest justifying a substantial burden on the plaintiff prisoner's religious exercise. 839 F.3d 386, 304 (3d Cir. 2016). The prisoner there had alleged that an officer's anti-Muslim harassment "caused him to stop praying." *Id.*

The Eleventh Circuit in *Johnson v. Brown* reached a similar conclusion. 581 F. App'x 777 (11th Cir. 2014) (per curiam). There, the plaintiff "alleged two specific instances in which prison officials interrupted [his]

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[4] In the Tenth Circuit, a right is clearly established "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). Other circuits take different approaches. *See, e.g.*, *Stephens v. DeGiovanni*, 852 F.3d 1298, 1316 n.14 (11th Cir. 2017) ("In this circuit, the law can be clearly established for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."); *Hill v. Crum*, 727 F.3d 312, 322 (4th Cir. 2013) ("In determining whether a right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the cases arose. . . . If a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense.").

prayers and ordered him to stop praying and leave." *Id.* at 779. Deeming the plaintiff's free exercise claim "plausible on its face," the court held that the district court clearly erred by granting qualified immunity because "the facts surrounding the defendants' justification for their alleged interference with [plaintiff's] religious practices must still be developed before a determination can be made as to whether the defendants acted reasonably" under the circumstances. *Id.* at 781; *see also Thomas v. Gunter*, 32 F.3d 1258, 1260-61 (8th Cir. 1994) (holding that because a material issue of fact existed as to whether refusal to allow inmates daily access to a sweat lodge for prayer was reasonably related to a legitimate penological objective, the district court erred in granting prison officials qualified immunity); *Hadi v. Horn*, 830 F.2d 779, 784 (7th Cir. 1987) (applying the test of "whether a valid connection exists between the regulation and a legitimate government interest" where plaintiff prisoners alleged that their First Amendment rights had been violated by the defendant's cancellation of their prayer service).

It is thus crystal clear that there must, at a minimum, be *some* "reasonable justification in the service of a legitimate governmental objective" to burden the free exercise of religion. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Otherwise, the rights specifically protected in the First Amendment would be rendered a nullity.

Here, however, there was no justification for the officers to order Ms. Sause to stop praying, under the facts alleged. In such circumstances, a reasonable officer would know that the Free Exercise Clause clearly

establishes that the officer cannot stop an individual from praying.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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